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## ENROLLED BILL ANALYSIS

**BILL NUMBER:** House Bill 5002 (S-3)

**TOPIC:** Workers Compensation Reform

**SPONSOR:** Representative Jacobsen

**CO-SPONSORS:** Representatives Bumstead, Jenkins, Damrow, Price, Lund, Agema, Pscholka, Olson, Shaughnessy, LaFontaine, Muxlow, MacGregor, Rendon, and Zorn

**COMMITTEE(S):** House Commerce  
Senate Reforms, Restructuring and Reinventing

**DATE INTRODUCED:** September 22, 2011

**DATE ENROLLED:** December 14, 2011

**DATE OF ANALYSIS:** December 14, 2011

### ADMINISTRATION'S POSITION:

The Agency has remained officially neutral on the legislation.

### PROBLEM/BACKGROUND

Michigan's workers compensation system is premised on a statute that will celebrate its 100<sup>th</sup> anniversary in 2012. While the Michigan Worker's Disability Compensation Act (the Act) has not had a major amendment in more than two decades, Michigan's appellate courts have continued to decide important workers compensation issues. House Bill 5002 is a major amendment to the Act that adopts key concepts which have developed in the appellate courts, and makes certain policy and administrative changes.

### DESCRIPTION OF BILL

In no particular order, the bill amends the Act to:

- Allow the Michigan Administrative Hearings System (MAHS) to determine whether an employee/employer relationship exists using the IRS 20-factor test, and provides an amnesty period of one year to promote compliance.
- Revise the qualifications for appointment to the Board of Magistrates, eliminates term limits and sets a process for review of appointees.
- Organizes the Michigan Compensation Appellate Commission in a manner consistent with EO No. 2011-6.
- Require an injury to be "medically distinguishable" from an employee's prior condition in order to be compensable.

- Require an employee's perception of actual events to be grounded in reality, for mental disability to be compensable.
- Provide that a limitation of wage earning capacity would occur only if an employee were unable to perform all jobs paying the maximum wages in work suitable to his or her qualifications and training.
- Include wages an employee earns or is capable of earning in the definition of "wage earning capacity", and provide that an employee would have an affirmative duty to seek reasonably available work.
- Modify the definition of "wage earning capacity" in a matter involving a first responder to eliminate the consideration of whether the wages were actually earned.
- Allow wage loss to be demonstrated by an employee's reasonable, good faith effort to find suitable work.
- Require an employee to demonstrate certain conditions in order to establish an initial showing of disability and wage loss.
- Provide that an employer would bear the burden of producing evidence to refute an employee's initial showing of disability and wage loss.
- Considers an employee that is terminated for cause to have voluntarily removed himself from the workforce and to therefore be ineligible for wage loss benefits.
- Include pension or retirement payments that an employee was entitled to receive, among amounts that must be deducted from weekly benefits, subject to a 50% cap for those receiving social security old-age benefits prior to being injured.
- Allow an employer to direct medical care for an injured employee for 28 days, rather than the current 10 days, from the start of medical care.
- Require the effect of medical treatment to be considered in a determination of whether the loss of a particular body part had occurred.
- Exempt from the Act a professional athlete who was hired under a contract with an out-of-State employer and injured while temporarily in Michigan, if certain conditions were met.
- Revise the calculation of interest on weekly compensation.
- Delete provisions under which a wife is presumed to be dependent on her husband for support.
- Allow the parties to stipulate to certain determinations regarding a redemption agreement, and to allow those stipulations to be entered by a Magistrate without a hearing.
- Allow claims to be made either electronically or on written forms.
- Allow an application for a hearing or mediation to be submitted electronically, and a magistrate's opinion and order to be submitted and distributed electronically.
- Provide that a subpoena signed by an attorney of record in an action would have the force and effect of an order signed by the magistrate or arbitrator associated with the hearing.
- Require the director of the Worker's Compensation Agency to report on fraud and other matters to the Legislature by April 1, 2012.
- Eliminate the current mediation system and place control of the mediation process in MAHS.
- The bill also would delete provisions concerning the Qualifications Advisory Committee, and would repeal Section 209 of the Act, which creates the Committee, and would

transfer its responsibilities to the Department of Licensing and Regulatory Affairs (LARA).

- In addition, the bill would repeal Section 211, which provides for the appointment of hearing referees, Chapter 7, which dealt with the sale of the Accident Fund, and Section 215 which required the Director to issue a biennial report to the legislature on the effect of inflation upon average weekly wage benefits (which use inflation in their calculation, rendering the report superfluous).

## **SUMMARY OF KEY ARGUMENTS**

### ***Pro***

If enacted into law, the bill will crystallize in statute certain Court of Appeals and Supreme Court opinions generally favorable to the business community. Workers compensation law at the Michigan appellate court level has swung widely over the last several decades. Settling recent case law into statute will result in a more stable business climate.

The bill makes important procedural changes that will assist both the Agency and MAHS in improving efficiency. The Agency will be able to handle certain matters electronically and will no longer be required to file certain redundant reports, for example, and the MAHS will be able to process settlements without a hearing by consent of the parties.

The bill results in over \$400,000 in savings through the elimination of four mediator positions. This savings is already built into the 2011-2012 LARA budget.

Partially disabled employees will be required to accept work which they can perform, or have their benefits lowered by the amount of the work refused. This will result in less abuse of the workers compensation system by workers able to be employed when a job is available.

The bill allows for a larger field of qualified candidates in the appointment of Magistrates and Appellate Commissioners by the Governor. The MAHS will also have greater control over the performance of appointees.

The Agency will use the same test to determine if an employer is misclassifying employees as independent contractors as is currently used by the IRS and the Unemployment Insurance Agency.

The improvement in function from use of modern medical advances, like joint replacement, will factor into whether a loss of use of a particular body part has occurred.

### ***Con***

Some may argue that this bill will reduce wages of partially disabled workers by “phantom wages,” or wages impugned to a worker for a job which is not realistically available.

Advocates, plaintiff's lawyers and some defense attorneys argue that the bill will result in workers compensation claims not being brought due to the expense associated with proving a disabled worker has met the standard of looking for available work.

Some of these same groups argue that the number of cases handled by MAHS will actually increase as insurers terminate or modify the benefits of partially disabled employees in cases currently being voluntarily paid.

Four mediators will lose their positions. Some of these employees, however, have "bumping rights" into other positions with the State.

The bill creates new reporting requirements for insurers, which will result in over 100,000 new filings with the Agency. The Agency believes this requirement was unintentional and hopes to revisit this issue if there is a follow-up bill.

"Wage earning capacity" is defined differently for first responders, as opposed to all other workers covered under the Act, creating a two-tier system of proofs in securing benefits. Police and Fire continue to have concerns with the bill that they would like to see ironed out administratively or through amendment.

## **FISCAL/ECONOMIC IMPACT**

### **(a) Department**

**Budgetary:** \$400,000 Savings

**Revenue:**

**Comments:** LARA will see a savings of approximately \$400,000 from the elimination of four mediator positions. This savings is included in the LARA 2011-2012 budget.

### **(b) State**

**Budgetary:**

**Revenue:**

**Comments:** It is unknown if there will be any revenue or budgetary implications to the state.

### **(c) Local Government**

**Budgetary:**

**Revenue:**

**Comments:** It is unknown if there will be any revenue or budgetary implications to local governments.

## **OTHER STATE DEPARTMENTS**

The only other Agency directly impacted by the bill is the Michigan Administrative Hearings System (MAHS) within LARA, which monitored the progress of this bill through the legislature.

**ANY OTHER PERTINENT INFORMATION**

The bill is supported by the Michigan Chamber of Commerce, the Michigan Manufacturer's Association and other business organizations. It is opposed by the Michigan Association for Justice and a number of labor organizations.

**ADMINISTRATIVE RULES IMPACT**

The Agency anticipates that several rule changes will be required to implement the bill. It is also likely that MAHS will consider certain rule changes regarding the processing of contested cases.